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NOTES ON RECENT LEADING ARTICLES IN LEGAL PERIODICALS.

JUDICIARY.

Independence of the Judiciary. Hon. Judson Harmon. In the beginning of his article Judge Harmon makes, by means of his eloquent phrasing, the old story of Coke's stand for judicial independence, newly fascinating. That the fight fought three centuries ago by Lord Coke is not even yet ended, is made plain as he comes to treat of the contemporary aspects of the subject. It is found that political organizations are not fitted to be entrusted with the grave task of choosing the judiciary. Most clearly and vigorously the author sets forth the situation as it is to-day:

"On every hand men have made haste to be rich, and have not been innocent. It is written they shall not be innocent. Corporate officers have forgotten that they are trustees for the stockholders; and both have forgotten that corporations with public franchises are trustees for the people. Or, if they have not forgotten, they have not cared. Fraud and graft have burrowed deep in private enterprises. Executive and legislative officers have been convicted and sentenced

for infamous official crimes. The people are aroused by reason of numerous frauds and impositions practiced on them, and by the insolent parade and misuse of wealth by persons who utterly lack the character and training necessary to qualify them to be entrusted with the control of wealth.

"Under such conditions the temptation to seek or sanction irregular justice is strong, and the immediate result is apt to hide the more remote and lasting consequences."

It is in the ability to foresee these lasting consequences and to stand firmly against the ephemeral demands of the day, however strong, that Judge Harmon finds the great protective power of an independent judiciary.

The American Lawyer. Vol. 14, *No.* 9, *pp.* 391-393.

The Legitimate Functions of Judge-Made Law. Hon. Hannis Taylor. We are told that "The world has given birth to only two great systems of jurisprudence. . . . As the Greek genius lacked the capacity to produce a philosophy of law, legal science must be regarded as a Roman creation, jurisprudence as a Roman invention." This view radically differs from that held by many men to-day, who find that in law, as in other realms of thought, the creative mind was that of the Greek, while the Roman mind was largely imitative, with a great talent for adapting the thoughts of others. That customary law develops into an "unelastic written Code;" and the agency of judge-made law is the only possible way out of the "strait-jacket in which it thus encases itself," is the avowed doctrine of the article. The argument is carefully and ably made, the historical development beginning with the judge-made law of Rome. In the working out of the demonstration here, we find the author giving full credit to the Greek philosophy for the expanding and ennobling force that finally lifted the idea of the *Jus Gentium* into a higher sphere than it had at first occupied among the Romans. The importance of the work of "edictal jurisprudence" throughout all life in the Roman times, is shown; "so while it may be said that the most famous and widely extended jurisprudence known to the world begins, as it ends, with a code, the fact must not for one moment be lost sight of that what gave importance to the first code and made the last possible, was the creative work performed by the jurisconsults and magistrates, who, during the ten centuries between the two, built up a scientific system of judge-made law, whose influence upon the history of mankind has been second only to that of Christianity itself."

Passing on to Judge-made law in England the story is found to be repeated; Digby is quoted to the effect that "decisions of tribunals, came to constitute in the strictest sense of the term a source or cause of law. Judge-made or judiciary law henceforth displaces Customary law." The agency of the doctrine of Equity is shown, and the fact noted that in England, unlike Rome, equity "has always abhorred codification."

In the United States judge-made law, it might seem, would owe its development in some degree to the world causes and fundamental principles noted in the growth of the older systems. In Mr. Taylor's apprehension, however, the universal cause and the fundamental principle seem to have been supplanted by Judge Marshall, to whom, it would seem, we owe the fact that our inflexible constitution has not kept us confined in our particular legal strait-jacket. Our debt to Marshall is great; it seems a pity that such exaggeration of that indebtedness should arise to lessen our sense of genuine gratitude and admiration. The right of the highest court of the nation to pass

on the validity of national law, was no "creation of Marshall's irresistible logic." It was a doctrine plainly recognized in the debates of the Constitutional Convention of 1787, and James Wilson had declared the doctrine many times in those debates, and in his speeches before the ratifying convention of Pennsylvania, as well as in the lectures he delivered before the law class of the University of Pennsylvania in 1790. Judge-made law to be a good thing would most certainly not be law made by any one judge in the pattern of his own mind, however great that mind.

The American Lawyer, Vol. 14, *No.* 9; *pp.* 400-404.

Legal Ethics.

Some Questions of Legal Ethics Suggested by the Life and Career of Lord Chancellor Bacon, Viscount St. Albans. Richard Ashhurst. Mr. Ashurst notes that for many years after the death of Lord Bacon no attempt was made to rehabilitate his character, but that "within the last half of the 19th century, however, carried away by the brilliancy of his achievements in Science and Philosophy, a school of writers has been developed, who, unwilling to see anything blameable in the character or conduct of a personage whose gigantic intellect they so rightly revere and admire, have undertaken to minimize and explain away Francis Bacon's misdoings." It is very rightly pointed out that this is carrying the spirit of charitable judgment to a dangerous point, since to "minimize and excuse his misdeeds, which from his eminence cannot be forgotten, tends to obscure the moral judgment and blind or mislead us as to ethical principles when the example set by the great man of the past is on the wrong side." Mr. Ashhurst undertakes the "invidious duty of again showing that the feet of the great image, or perhaps even higher parts of the splendid figure, are of clay," and he fulfills this duty so well that in the end the reader feels, not so much that Francis Bacon's sins have been again shown in all their blackness, as that professional honor, the integrity of the legal character, and the simple principles of honesty and uprightness which should govern all men, whatever brilliancy of intellect they may possess, have been upheld, defended and set forth in all their proper proportions.

The Green Bag. Vol. 18, *No.* 9, *pp.* 505-515.

The Year Books.

The Year Books. W. S. Holdsworth. Mr. Holdsworth here gives us the first part of a very interesting account of the Year Books. The publication by the Selden Society of a translation of a part of the "Maynard," or Year Book of Edward the Second, from manuscripts hitherto not published, has given rise to what may be called a "renaissance" of the old legal learning. That which had interested the very few, now interests—if not the many—at least a goodly number. Mr. Soule, of Boston, who has given us such valuable and reliable data in regard to the Year Books, is much relied upon by Mr. Holdsworth, as indeed he must be by any one speaking or writing on the subject.

As we stir what has been regarded as the dead dust of those old records, we find that it begins to glow and palpitate with life, and those who write of it show it blossoming forth with quaint anecdote, witty story, pathetic incident. When Mr. Wallace wrote his "Reporters" in the middle of the last century he thought that only the antiquarian who desired to go "beyond beyond," would ever care for any other edition of the Year Books than that edition of 1788-80, that was supposed to be the best as it was the latest. To-day that edition stands

discredited and we seek the productions of the presses of Machlinia, Pynson, Redman, Tothill, and their immediate successors, all of whom lived in that dim "beyond beyond" of time, where Mr. Wallace found so much of interest, and where we of to-day are only too glad to follow him.

The Law Quarterly Review. Vol. 23, No. 87, pp. 266-284.

Case Law.

The Basis of Case Law. A. H. F. Lefroy. It is contended that "Where there is no governing precedent, direct or indirect, justice and other principles of right and wrong, the fitness of things, convenience and policy, make case law." Also "that if it is the fact, as it is stated in a recent well-known work, that 'a commonsense or reasonable view of the circumstances of the case would be considered a rather audacious ground of judicial decision by most lawyers, more especially, perhaps, in England,' this is only because the accumulation of precedents, direct or indirect, has become so great, and the original foundations of case law are buried so deep beneath the superincumbent mass, that lawyers have lost sight of them." The author then goes on to demonstrate the truth of his position by a review of cases in which there was no authority to guide or control the Court, and in which he shows that there was a direct appeal to, or reliance on, the grounds that he has given as those which make the basis of case law. It seems that it should be unnecessary to adduce any proof that "justice, humanity, and morality are primary sources of case" or any other law. The case that is decided according to a long line of decisions is so decided because those decisions rest upon such bases, or it is so decided because the Court is incompetent to discover the evil inherent in the first decision and the continuous error of those following. In the latter case it is not the law which is or has been in error but the individual infirmity—common to all professions—which is to blame. That the case lawyer sometimes forgets that the cases upon which he relies have any value beyond the fact that there are many of them on his side, and that certain judges more or less eminent decided them, may be true, but it does not alter the fact that the man who relies upon a "good case" or a long line of them relies on the fundamental principles underlying them, whether he is aware of that fact or not.

Mr. Lefroy makes this very clear, and is doing a very good work in thus showing the true value of case law, which too often rests under the reproach which should fall upon those who use without understanding it. The article is to be continued.

The Law Quarterly Review. Vol. 22, No. 87, pp. 293-306.